

LAW OFFICES OF
JOSHUA L. DRATEL, P.C.
A PROFESSIONAL CORPORATION
29 BROADWAY
Suite 1412
NEW YORK, NEW YORK 10006

TELEPHONE (212) 732-0707
FACSIMILE (212) 571-3792
E-MAIL: JDratel@JoshuaDratel.com

JOSHUA L. DRATEL
—
LINDSAY A. LEWIS
WHITNEY G. SCHLIMBACH

STEVEN WRIGHT
Office Manager

July 18, 2018

BY ECF

Molly C. Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
P.O. Box 193939
San Francisco, California 94119-3939

Re: *United States v. Moalin, et al.*,
Docket No. 13-50572

Dear Ms. Dwyer:

This letter is submitted on behalf of defendant Basaaly Saeed Moalin, whom I represent in the above-entitled case. Pursuant to Fed. R. App. P. 28(j), Appellants respectfully write to call the Court's attention to the Supreme Court's recent decision in *Carpenter v. United States*, No. 16-402, 2018 WL 3073916 (U.S. 2018).

In *Carpenter*, the Supreme Court held that the government must obtain a warrant before collecting at least seven days' worth of an individual's "cell site location information" from wireless-phone carriers, notwithstanding the fact that such information is held by a third party. *Id.*, at *9. *Carpenter*'s rejection of the so-called "third party doctrine" in connection with CSLI is directly relevant to the bulk-collection program used in this case.

The government has defended the bulk-collection program at issue in this case by pointing almost exclusively to *United States v. Smith*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976). See Gov't Br. 55–57 (Apr. 15, 2016), ECF No. 34. In response, Appellants argued that those cases cannot be automatically extended to bulk collection of telephony metadata at issue here. See Appellants' Joint Reply Br. at 7–10 (Sept. 2, 2016), ECF No. 63; Appellants' Joint Opening Br. at 77–104 (Dec. 11, 2015), ECF No. 30. In *Carpenter*, the Supreme Court "declined to extend *Smith* and *Miller* to cover the[] novel circumstances" of that case. 2018 WL 3073916, at *9. The Court reasoned that, by itself, "the fact that the Government

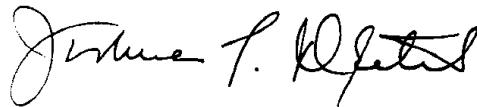
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obtained the information from a third party does not overcome” an individual’s reasonable expectation of privacy. *Id.*, at *12. In its analysis, the Court cautioned that the Fourth Amendment guards against the government engaging in “near perfect surveillance . . . allow[ing] it to travel back in time,” *id.*, at *10, “tireless and absolute surveillance,” *id.*, or ““a too permeating police surveillance,”” *id.*, at *6 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The reasoning animating the holding in *Carpenter* is precisely what Appellants have argued in challenging the government’s bulk collection, retention, and subsequent review of phone records. Given the significance of the *Carpenter* opinion, Appellants would welcome the opportunity to more fully brief the effect of the Supreme Court’s ruling on this appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joshua L. Dratel", written in a cursive style.

Joshua L. Dratel

JLD/